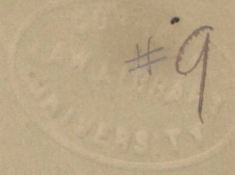

ARGUMENT

OF

THOMAS J. SEMMES, Esq.,

IN THE CASE OF

WM. PITT KELLOGG

vs.

H. C. WARMOTH, Governor of Louisiana, and others.

Levin senior

Before the Circuit Court of the United States for Louisiana, on Tuesday, the 26th of November, 1872, on a rule nisi, to grant an injunction under the Enforcement Act of 1870, and the amendments thereto.

REPORTED BY C. W. COLTON, Phonographer.

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Chile
Peru.

Circuit Court of the United States.

New Orleans, November 26, 1872.

WM. PITT KELLOGG
v.
H. C. WARMOTH, *et als.*
No. . In Equity.

ARGUMENT OF T. J. SEMMES, ESQ.

May it please your honor, I cannot help feeling gratified at the course which your honor, with that sagacity and intelligence with which justice is administered in this court, adopted in taking the view that the rule for contempt should await the argument upon the merits of this cause; because your honor, as a very well-educated lawyer, foresaw that, under the established rules of chancery practice, even if the parties had been guilty of the alleged contempt, if the order should be revoked which had been granted on the hearing, the contempt would necessarily fall with the revocation of that order; as it is well known in chancery that the dismissal of the bill revokes the rule for contempt. This was decided by the Supreme Court of the United States itself in the great case of the Wheeling bridge. There an injunction had been granted, directing that the parties engaged in the construction of the Wheeling bridge should cease to go on with it. Nevertheless, during the adjournment of the court, they persisted and constructed the bridge. When the court met, an act of Congress in the meanwhile having been passed which legalized the construction of the bridge, the question came up whether the court would or

would not punish these parties for constructing the bridge in violation of the injunction. By a divided vote they refused to punish for contempt upon the ground that, the act having been legalized, they had no authority to punish for the act which had been done, and which at the time that the application for punishment was made was legal. So, in the courts of New York a decree was granted enjoining a party from doing an act; he violated the injunction pending an appeal; on appeal the judgment was reversed, and the court then refused to punish for contempt after the reversal of the judgment, the legal principle being that, if at the time that the person is to be punished the order or decree of the court is revoked or the suit dismissed, the contempt, if any, ends and ceases to exist. Therefore, I say it was very proper for your honor to do as you have done—to await the argument of this case upon its merits, as to the granting or non-granting of this injunction, before you would act upon the question of contempt.

The preliminary question, may it please your honor, in regard to the jurisdiction of the circuit court of the United States over the subject-matter of this case, in so far as it is presented by the bill, requires a slight analysis of the bill itself in order to ascertain what the case is, what object is had in view by the case as presented in the bill, and what relief is sought for by it. Now, sir, what are the allegations in the bill? That ten thousand persons of color, entitled to registration under the laws of this State, were, prior to the election, refused registration, on the ground of race, color, and previous condition of servitude, and thereby, in consequence of the refusal of the right of registration, they were deprived of their votes; and that these ten thousand voters thus refused, if they had been registered, would have voted for the complainant in this bill as candidate for Governor; and the further allegation is, that the evidence of the refusal of the right to vote of these ten thousand voters thus refused registration has been preserved by virtue of the provisions of the act of Congress approved in May, 1870.

The next allegation is, that the supervisors of registration have suppressed a sufficient number of votes, which if they had not been suppressed would have been adequate to the election of Kellogg, the complainant in this bill, as candidate for Governor. But, if I have read the bill right, the votes suppressed are not alleged to have been suppressed on the ground of race, color, or previous condition.

The next allegation in the bill is, that through the instrumentality of an illegal board, consisting of F. H. Hatch, Durant DuPonte, and Jack Wharton, unlawfully elected in the manner described in the bill, the Governor desires to fraudulently do—what? The object of creating this fraudulent board, according to the allegations of the bill, is to do the only thing which the board of canvassing officers could do to affect the election; and that is, to exclude the votes of certain parishes, upon grounds stated in the election bill—on the ground of the voice of the said parishes not being fairly heard, on account of intimidation, or violence, or tumult. The allegation, therefore, is not that this fraudulent board is going to exclude the votes on account of race, color, or previous condition, because such allegation could not be made; it would be utterly impossible. When the commissioners are called on for the purpose of examining the question whether, on the ground of fraud, intimidation, or violence, a certain poll should be excluded, necessarily the whole poll is excluded, white and black, and the allegation could not be made, and has not been made, that the object of the Governor was to exclude votes which had been deposited, on account of race, color, or previous condition. What remedy does the bill ask? It asks that your honor shall interpose in this conflict between these two boards, each claiming to be the legitimate returning officers, and, by way of injunction, to determine which is the legal board, and to arrest the action of the one, and compel the Governor, who is charged under the law with the possession of the votes, to open and submit them to the investigation of the other. You are, then, called upon, by an injunction in chancery, to determine who are, and who are

not, the legally constituted officers of the State, charged with this duty. And you are called on to do that in conjunction with and as a part of—what? Not in a case where you are called on to decree ultimate and final relief, but in a bill, only a bill to perpetuate testimony—a bill based exclusively upon the ground that Mr. Kellogg, by the state of things existing, is already defeated, and that, under the act of Congress of 1870, being defeated, he proposes to contest the election of Mr. McEnery; and before he can bring this suit as a defeated candidate, and assert his rights, you are asked to interpose, as a court of chancery, by way of a bill to perpetuate testimony, and arrest the counting of these votes by the Governor and his board, upon the allegation, unsupported by any proof whatsoever, except the allegation of the complainant in the bill, that, if you do not interpose, the Governor and all his colleagues will be guilty of the high crime and misdemeanor of altering, defacing, and suppressing these returns which have been thus made. That is the case. When I have stated the case to an educated mind in the legal profession, (and I have stated a case which concedes that the act of Congress of 1870 is constitutional, which question I leave to my colleagues to discuss,) I have stated a case not embraced within the provisions of the act; a case not within the power of a court of chancery, if it be within the provisions of the act; a case in which Congress has nowhere delegated the authority to this court to interpose, for the purpose of granting the relief prayed for in the bill.

Is it necessary, sir, for me to read the act of Congress? I suppose that almost every one, since the pendency of this important controversy, has read it. The jurisdiction of the court is avowedly based upon one section only, and that is section twenty-three:

"That whenever any person shall be defeated or deprived of his election to any office, except Elector for President or Vice President, or Delegate in Congress, or member of the State Legislature, by reason of the denial to any citizen or citizens who shall offer to vote of the right to vote, on ac-

count of race, color, or previous condition of servitude, his right to hold and enjoy such office and the emoluments thereof shall not be impaired by such denial; and such person may bring any appropriate suit or proceeding to recover possession of such office; and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offer to vote on account of race, color, or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides. And said circuit or district court shall have, concurrently with the State courts, jurisdiction thereof, so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the fifteenth article of amendment to the Constitution of the United States and secured by this act."

Your honor will therefore observe, that it is a special jurisdiction conferred upon this court, and it is unnecessary for me to refer to authorities to establish the proposition, that the jurisdiction of the courts of the United States is limited by acts of Congress, and that, although the courts, under the constitutional amendment, may be enabled to exercise a more enlarged jurisdiction than that actually conferred by the acts of Congress, yet the arm of the courts is paralyzed until the jurisdiction which under the Constitution Congress can confer is actually conferred by a specific enactment upon the courts. Therefore, in all questions before the circuit court of the United States we call upon the parties who invoke the interposition of those courts to produce an act of Congress under which those courts can exercise the constitutional functions which they propose to exercise or which the parties invoke. Now, what is the jurisdiction conferred? The jurisdiction is conferred upon the court to give relief—to whom? To a person who, being a candidate for office, is defeated or deprived of that office in consequence of the denial of the right to vote secured by the fifteenth amendment to the Constitution of the United States, to wit: the right to vote to persons being of a certain race, color, or previous condition of servitude. And

the act goes on to declare that such person may bring his suit when it shall appear that the sole question touching the title to such office arises out of the denial of this constitutional right.

Therefore, sir, I say that no case, either in law or in chancery, can be instituted in this court for the purpose of obtaining possession of a State office, except upon the sole ground that the right to the office has been defeated by the denial to citizens of the right to vote on account of race, color, or previous condition of servitude; that if there be other causes—if there be frauds practiced upon black and white, if there be votes excluded for any other cause than the cause assigned by the constitutional amendment—the court has no jurisdiction to inquire into the subject; and, therefore, the only part of this bill which the court of chancery can entertain—supposing it to be a bill which a court of chancery can entertain at all—is that part of the bill where it is alleged that citizens have been excluded from voting or registration on account of race, color, or previous condition of servitude; and if that be all and this be a bill to perpetuate testimony, upon their own statement the bill is unnecessary; and why? Because they say—and they have brought the evidence before your honor—that the evidence has been preserved under the act of Congress, and they have got the evidence in their possession and we have it not. What do they want a bill of discovery for, when they come in here and tell us "we are defeated by the rejection of ten thousand votes and we have the evidence in our possession?" And yet you are to enjoin the Governor of this State and the legitimate board from counting votes—not rejected votes, because they could not be counted; not votes the evidence of which has been annexed to these returns and to be submitted to this fraudulent board; no, but votes the evidence of which, if they be legal votes, they have already in their possession and now bring into this court where you are asked to interpose to perpetuate testimony. They say there are votes suppressed. And grant that the allegation be made that they are suppressed on account of race, color,

or previous condition of servitude, then they are suppressed; then they do not appear upon the returns; then they have not been counted; then they could not be counted; then the returns do not show these suppressed votes; then, what do you come here to discover?

You allege a fraud, not only against the supervisors of registration, (and these are the only people who are charged as combining with the Governor to accomplish the stupendous frauds stated in this bill,) but you charge a suppression of votes, which could not be accomplished except through the connivance of the commissioners of election, not appointed by the Governor, and against whom no charge has been made. You say they have suppressed votes, for they could not be suppressed in any other way. They have not counted the votes; they could not be counted in any other way but by a refusal to count them by the commissioners of election. You have alleged a fraud in which four parties must participate, the supervisor of registration as well as the three commissioners of election, without charging fraud against the commissioners of election, and you say they have accomplished the suppression of votes, which are, therefore, not stated in the returns now on file in the Governor's office. And yet you say that this court has jurisdiction by way of a bill, for the purpose of perpetuating that which the Governor could not by any possibility have in his possession. Then you say that these returns are to be manipulated, are to be altered, are to be mangled; this could not be on account of race, color, or previous condition. Who is to do this? You say the Governor and his fraudulent board, and you want testimony to perpetuate the returns as they are. Look at the law, and your honor will perceive that it is utterly impossible that this fraud should be perpetuated as alleged, and in the mode alleged, without going through the courts of all the districts of this State and destroying there the records of those courts. Section 29 of the election law of 1870 says:

"That in any parish, precinct, ward, city, or town, in which during the time of registration or revision of registra-

tion, or on any day of election, there shall be any riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, at any place within said parish, or at or near any poll or voting place, or place of registration, or revision of registration, which riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, shall prevent, or tend to prevent, a fair, free, peaceable, and full vote of all the qualified electors of said parish, precinct, ward, city, or town, it shall be the duty of the commissioners of election"—

And here there is no fraud charged against these commissioners—

—"if such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corupt influences occur on the day of election, or of the supervisor of registration, or any assistant supervisor of registration of the parish, if they occur during the time of registration, or revision of registration"—

Your honor will observe that the commissioners of election perform this duty on the day of election, and the supervisors of registration upon the day or at the time of registration—

—"to make in duplicate, and under oath, a clear and full statement of all the facts relating thereto, and of the effect produced by such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, in preventing a fair, free, peaceable, and full registration or election, and of the number of qualified electors deterred by such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, from registering or voting, which statement shall also be corroborated under oath by three respectable citizens, qualified electors of the parish: When such statement is made by a commissioner of election, or assistant supervisor of registration, he shall forward both copies to the supervisor of registration immediately on the close of the election. The supervisor of registration shall forward one copy of all such statements, whether made by himself, or by a commissioner of election, or by an assistant supervisor of registration, to the Governor, and shall deposit one copy with the clerk of a distinct court of the parish."

So, sir, we are, of course, to presume that if all these

statements have been made, which under the fifty-third section of the bill must be statements of that sort to give this returning board jurisdiction to act at all; and if Governor Warmoth should determine to destroy all of these statements, still certified duplicates are filed with the clerks of all the district courts of the State, and therefore there is no necessity to perpetuate that testimony. What is there, then, to be perpetuated? Is it the list of voters, or the count, whether fraudulent or otherwise, which has been made by the commissioners of election? The law provides for triplicates of those—one to be sent to the Governor by a special messenger, one to be sent by mail, and the third to be preserved by the commissioners of election. Therefore, there is running through the whole system a preservation of duplicates and records of all of these statements, and of all of the counts, and of all the returns; and it would be a futile act on the part of the Governor, with a view to defeat a particular candidate for the office of Governor, to resort to the crime—the high crime—with which he is charged, of the intention to manipulate these returns; and, in addition to that, to destroy and suppress them. And, sir, when you come to consider in this connection that this charge is made by a candidate for the office of Governor, and not by a candidate for any other office in the State—when in this connection and in connection with that office you come to consider the constitutional provision as to who shall be the ultimate returning board to determine the election of Governor and Lieutenant Governor—you will find that this party, before he could institute this suit, as he professes or says he intends to do, has a remedy beyond Governor Warmoth, has a remedy beyond this returning board: he must show that their action would be final and conclusive. Their action, so far as he is concerned, so far as the office of Governor and Lieutenant Governor is concerned, is in no manner obligatory upon the two houses of the General Assembly when they assemble, in pursuance of the constitution, to count the votes and decide who is Governor and who is not.

Article forty-eight of the constitution is as follows:

"The supreme executive power of the State shall be vested in the chief magistrate, who shall be styled the Governor of the State of Louisiana. He shall hold his office during the term of four years, and together with the Lieutenant Governor, chosen for the same term, be elected as follows: The qualified electors for Representatives shall vote for Governor and Lieutenant Governor at the time and place of voting for Representatives. The returns of every election shall be sealed up and transmitted by the proper returning officer to the Secretary of State, who shall deliver them to the Speaker of the House of Representatives on the second day of the session of the General Assembly then to be holden. The members of the General Assembly shall meet in the House of Representatives to examine and count the votes. The person having the greatest number of votes for Governor shall be declared duly elected; but in case of a tie vote between two or more candidates, one of them shall immediately be chosen Governor by joint vote of the members of the General Assembly. The person having the greatest number of votes polled for Lieutenant Governor shall be Lieutenant Governor; but in case of a tie vote between two or more candidates, one of them shall be immediately chosen Lieutenant Governor by joint vote of the members of the General Assembly."

Do you tell me that if this returning board, by any fraud on their part, should declare Kellogg elected or McEnery elected, both houses of the General Assembly, when they meet, would not have a right, as the constitutional board authorized to declare who is elected Governor and who is not elected Governor, to inquire into these alleged frauds, send for duplicates of these suppressed or destroyed returns filed with the clerk of the courts throughout the State, and adjudicate on this question of elected *vel non?* I want to know, if they undertook to do so, what tribunal in this land could revise their action? I admit, that if they excluded a man's vote on account of race, color, or previous condition, this court, conceding this act of Congress to be constitutional, would have jurisdiction. But what court could revise the action of the General Assembly if the election is declared upon other principles, disconnected with the con-

stitutional amendments? Here are votes alleged to be fraudulent. Here are these returns brought up which are said to have been manipulated. The General Assembly is the court of last resort. This constitutional court, the General Assembly of the State, determines all these questions, and there is no appeal from its decision, except that conferred by the act of Congress, conceding it to be constitutional, where the right to vote has been denied on account of race, color, or previous condition of servitude. Here this party brings his suit, admitting or alleging in this bill that he is defeated; and, of course, he alleges that he is defeated at the time he brings his bill, otherwise he would have no right to file his bill. Then he is defeated by the state of things which he wishes to preserve in *statu quo;* he is defeated by the state of things in the Governor's office.

Take things as they exist, take the official returns, aside from all fraud alleged in regard to matters pertaining to the returns before they reached the Governor's office. The bill proceeds upon the theory that the complainant is defeated upon these returns, therefore the destruction of these returns would not hurt him. He is now and then and there defeated. He proceeds upon the theory that he is defeated. He proceeds upon the theory that he intended to bring an action as a defeated candidate; and that, as I understand the bill, the defeat was the result of the ten thousand rejected votes, and the result of the suppression of the numberless votes which he does not undertake to define, and which he alleges have been suppressed by the commissioners of election. He not only does not undertake to define these votes, but he does not undertake to state in which parish they were suppressed. According to his allegations, in all the parishes of the State there was not to be found an honest commissioner of election or an honest supervisor of registration; but that all of them were in combination with Governor Warmoth, this Mephistophiles, who had diffused his poison throughout the whole official mind charged with the supervision of this election, and who so contaminated the soul of everybody who had charge of the

ballot-boxes, that they violated all oaths and suppressed votes at every poll, the number not given; but the allegation is made that the number thus suppressed would be sufficient to change the result. Here, then, as I said, is a defeated candidate instituting this suit, being already defeated by the returns in the office of the Governor, and whose defeat is based upon suppressed votes that are not there, upon rejected votes of which he has the evidence in his possession. And this is styled a bill in chancery to perpetuate testimony; and this is filed to preserve evidence in the possession of the Governor, of which there are duplicates made under the laws of the State and recorded as required by law; for they have made no affidavit here that these commissioners did not comply with the law and record those copies. Now, then, the fraud charged in the bill in regard to the returns in the office of the Governor is a charge that Governor Warmoth desires to exclude votes, and it is based upon the fifty-fourth section of the election law, which is as follows:

* * * * "The Governor shall at such meeting open, in the presence of the said returning officers, the statements of the supervisors of registration, and the said returning officers shall, from said statements, canvass and compile the returns of the election in duplicate. One copy of such returns they shall file in the office of the Secretary of State, and of one copy they shall make public proclamation, by printing in the official journal and such other newspapers as they may deem proper, declaring the names of all persons and offices voted for, the number of votes for each person, and the names of the persons who have been duly and lawfully elected."

They have no right to declare who is duly and lawfully elected as Governor; that power could not be delegated to this board under the constitution. The section goes on to say—

"The returns of the elections thus made and promulgated shall be *prima facie* evidence, in all courts of justice and before all civil officers, until set aside, after a contest according to law, of the right of any person named therein to hold

and exercise the office to which he shall by such return be declared elected. The Governor shall, within thirty days thereafter, issue commissions to all officers thus declared elected who are required by law to be commissioned."

This law says that the Governor shall issue commissions to all such persons thus declared elected, evidently contemplating that this returning board should only declare the election of those officers who are required to be commissioned by the Governor, and all officers of the State are required to be commissioned by the Governor except the Governor himself, who has no commission from any source. This commission is a public declaration of the members of the Legislature in General Assembly convened, announcing the result of the vote. Section 55 reads:

"That in such canvass and compilation the returning officers shall observe the following order: They shall compile, first, the statements from all polls or voting places at which there shall be a fair, free, and peaceable registration and election. Whenever from any poll or voting place there shall he received the statement of any supervisor of registration, assistant supervisor of registration, or commissioner of election, in form as required by section twenty-nine of this act, on affidavit of three or more citizens"—

So your honor will perceive that it is only upon the reception by this board of the report required to be made by a commissioner of election, or a supervisor or assistant supervisor of registration, under section twenty-nine, on the affidavit of three citizens, that this board of returning officers, of which the Governor is the head, is authorized to take any action—

—"of any riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, which prevented, or tended to prevent, a fair, free, and peaceable and full vote of all qualified electors entitled to vote at such poll and voting place, such returning officers shall not canvass, count, or compile the statement of votes from such poll or voting place until the statements from all other polls or voting places shall have been canvassed and compiled. The returning officers shall then proceed to investigate the statements of riot, tumult, acts of violence, intimidation, armed

disturbance, bribery, or corrupt influences, at any such poll or voting place; and if, from the evidence of such statements, they shall be convinced that such riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, did not materially interfere with the purity and freedom of the election at such poll or voting place, or did not prevent a sufficient number of qualified voters thereat from registering or voting to materially change the result of the election, then, and not otherwise, said returning officers shall canvass and compile the vote of such poll or voting place with those previously canvassed and compiled; but if said returning officers shall not be fully satisfied thereof, it shall be their duty to examine further testimony in regard thereto, and to this end they shall have power to send for persons and papers. If, after such examination, the said returning officers shall be convinced that said riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, did materially interfere with the purity and freedom of the election at such poll or voting place, or did prevent a sufficient number of the qualified electors thereat from registering and voting to materially change the result of the election, then the said returning officers shall not canvass or compile the statement of the votes of such poll or voting place, but shall exclude it from their returns."

You will therefore perceive that the only power whatsoever given to this returning board, is to go through the simple clerical labor of adding together the returns made by the commissioners of election, duplicates of which are filed with the clerks of the courts throughout the State; and the only other jurisdiction which it has is, that when these statements are made by the supervisors of registration or the commissioners of election in regard to fraud or violence upon the affidavits of three citizens, then I say it is constituted a board to investigate and determine upon that question; and if they come to the conclusion that riot, tumult, or unfair practices prevented a fair vote at any particular poll, they do not reject any particular vote, but their jurisdiction gives them only the right to exclude the poll, and exclude all the votes, black and white. There is no discrimination in regard to color. There is no constitu-

tional right guaranteed by the fifteenth amendment which applies exclusively to the protection of the rights, in regard to voting, of those of a certain race, condition or color, which this board has any control over. They have no jurisdiction on that subject. It is impossible to exercise the jurisdiction conferred in a way to create a case coming under the constitution or under the enactment of Congress. Your honor will remember that this fraud is charged upon him with the view, as Kellogg asserts in his bill, that Governor Warmoth desires to exclude votes, and the implication is of necessity that Governor Warmoth will count, unless your honor interferes to prevent this enormous fraud, all the votes and exclude none of the boxes; for the charge made, though twisted and turned with that verbose phraseology which makes it difficult to extract the essence and the idea of the bill, when analyzed, and when you eviscerate the real charge, is, that all of this manipulation, suppression, and fraud, is simply with the view to exclude votes, or rather to exclude returns; and I call the special and particular attention of your honor to that clause of the bill, to show that I have interpreted it correctly. After describing the conflict between these two boards, the bill goes on to say:

* * * "That your orator believes, and therefore avers the fact to be, that it is the intention and deliberate plan of the said defendants aforesaid, pretending to act as returning board as aforesaid, to make such pretended canvass of votes as shall effect an apparent defeat of your orator, and declare the said McEnery elected as Governor of said State; that to produce said result they will give effect to all such fraudulent certificates and returns as tend to produce such an effect, and tend to exclude from all consideration, count, or canvass all votes of persons of color that have been suppressed or prevented from being cast." * * *

I have read this extract to show that these returns, even if destroyed, by no means affect the votes rejected or the votes suppressed, because, of course, they are not included in the count or in the returns which are on file in the office of the Governor. The bill goes on to say:

"And your orator further shows, that said defendant, H. C. Warmoth, claiming to be in possession of the returns of a large number of the supervisors of registration, refused to open said statements of the supervisors of registration in the presence of said returning officers, being influenced in said refusal, as your orator believes, by the fear that said returning board would make due and proper investigation of the truthfulness of said returns and statements." * * *

Now, the only due and proper investigation of the truthfulness of these statements would be to investigate in regard to fraud and violence in the election, because that is all the jurisdiction this board has, except the physical labor in counting the returns of the commissioners.

"And that said scheme for excluding lawful ballots would be defeated; or that evidence of the frauds that had been committed, and of the fact that a large number of persons had at such election offered to vote, and had been denied the right to vote, contrary to the Constitution and laws of Congress, would be discovered." * * *

Now, the law does not require, in regard to persons who offer to vote, the commissioners of election to take any evidence whatever; nothing of that sort is returned. As I have said, the complainant has possession of that. The frauds in regard to suppressed votes could not appear on the returns; therefore the only fraud which could by any possibility be committed, would be in determining to reject or exclude certain votes or polls on the grounds stated in sections 29 and 54 of the election act of 1870. That is the only possible jurisdiction this board has, and the only possible way by which Kellogg could be at all affected would be by this board, vested with this power to determine these questions, excluding votes not on account of race, color, or previous condition, but on the ground of violence, tumult, and unfair practices. That exclusion, I say, could not affect him, because he brings this suit upon the ground that by the returns, as they stand, he is a defeated candidate, and that he has a right to preserve them. The exclusion of some votes will not make him a worse defeated candidate than he is now. I therefore say, sir, that granting the

constitutionality of the act of Congress of 1870, for the purposes of the argument; granting that we do not appreciate the changes which have taken place by virtue of the adoption of the fourteenth and fifteenth amendments to the Constitution of the United States; granting that the learned counsel who opened the case is the only one in this community who does appreciate these important changes; granting that he has the right to arrogate to himself that sort of self-complacent satisfaction manifested by the insinuation that we are the Bourbons and he the man of progress, so far as the constitutional theory is concerned—so far as the Constitution has been affected by the amendments adopted since the war: yet I can tell him that he forgets that whatever may have been the past, so far as this election is concerned, in respect to the constitutional amendments, both parties stood upon the same platform. Both parties accepted the fourteenth and fifteenth amendments, and declared that they accepted them in good faith and honor. Both parties agreed to stand by them. Both parties, one represented by Mr. Greeley, the great defender of the colored race, and the other by Grant, the representative of the constitutional amendments, agreed upon this question. Therefore it comes with bad grace from the learned counsel to say that any of us who are engaged in the attempt to maintain the purity of the ballot-box, to assert simply our local rights under a legitimate State government, are forgetting our duty to the Constitution, and will attempt to rise before this court and make an argument upon a constitutional theory, which we concede that the war, in part, has destroyed, and to which we submit, and which in other parts has been changed by the constitutional amendments referred to. He must think, indeed, that progress lies upon only one side of this case, and that we, who conceive that we are right, (although I grant him the same privilege,) are blinded by the prejudices of the past, and are not able to see the case as it is presented by the light of the nineteenth century and of the year 1872, instead of 1861.

But still, although I say that we are up to the times and

recognize these constitutional changes, and perceive that there is difficulty in consequence of these changes in drawing the line of demarcation between what has been changed and what has not, because the questions are intricate, we do not concede that the constitutional government created by our ancestors, by which the States are separated from the Federal Government, and charged with the execution of certain local affairs, while the general government is classed with our foreign and general domestic affairs—we do not recognize that all these landmarks have been destroyed and broken down by the constitutional amendments referred to, and that the State to-day, as the counsel sneeringly said, is a municipal government, which it was in the power of Congress to destroy if it pleased; when the very essence of the Government depends now, as it did when it was first formed, upon the constitutional theory that there *are* States, aving separate and independent powers, under a generalh government which under the constitutional amendments has more enlarged powers than it had before. It is true the constitution was changed, but it was only changed to the extent of the powers conferred by that instrument and its amendments, all others being, as they were in the beginning, reserved to the States or the people thereof respectively. What really is the effort here, sir? The insinuation in regard to the constitutional power was thrown out for an object. The effort here is practically to have the United States court interpose, when the act of Congress does not give it the power to do so, and declare who is or who shall be the legal board of returning officers for this State; and the pretext is that we have corrupted all of the officers of election; that the men elected have participated in this corruption; that even a candidate whose reputation up to this time has never been assailed in any court of justice or elsewhere, Governor McEnery, has participated in these frauds, and your honor has actually enjoined him for the time being—unadvised, of course—from acting as Governor of this State. And, sir, when in the face of these alleged frauds we bring in the affidavits of all who are charged with

them, denying them; when there is no evidence whatsoever of such frauds except the allegation made by the complainant in his bill; when we go a step farther and say, "Now you have charged us with fraud, we believe that you desire to get possession of these returns for a fraudulent purpose on your part. You have restrained us from counting these votes in the federal court; we have restrained you from counting the votes in the State court: thus locking up all the administrative powers of the State government, by which alone it is enabled to perpetuate its existence." When the Governor of this State, in that condition of things, signs a bill by which the authority of these two contending boards is repealed, he is charged with what! With a *coup d'etat*, to defeat the operation of your honor's injunction; and the learned counsel has the hardihood to insinuate that the approval of that bill by the Governor, in the exercise of his constitutional functions as the Chief Executive of this State, was a violation of your honor's injunction.

What new theory of *coups d'etat* is this? A *coup d'etat* I understand to be an unconstitutional assumption of authority, by which the established government is overthrown, either in whole or in part; and yet this constitutional lawyer, who is up to the progress of the times, calls a constitutional function, performed by the Chief Executive, over which nobody has any control, a *coup d'etat;* as if the Governor of this State, or of any other State in this Union, could ever be guilty of a *coup d'etat* in the exercise of his constitutional functions. They say that this *coup d'etat* is to be carried out by a fraud. What fraud, sir, can we commit? They say that we desire, through the instrumentality of Hatch, DuPonte, the Governor, and Wharton, to perpetrate these enormous frauds on the State. What do we do? We come in now and lay down our power; we abandon the position where we are enabled to commit this fraud; we surrender the authority to act as returning officers of this board, because the repealing act repeals that authority; and, in order to put our act beyond all question, we convoke the newly-elected Legislature to nominate and appoint

officers, who shall count these returns and give everybody a fair show. Does that show fraud? The man who occupies the vantage ground, the man who is in possession, the man who is enabled by the physical power of the State, as the Executive, to carry out, so far as the State courts are concerned, his objects of fraud, if he desired to do so, that man, when charged with fraud in this court, comes in and says: "To show that these allegations are false, to show that they are perfectly baseless, to show that these men themselves have entered into a scheme to get possession of these votes, in order to defraud the people of this State, I come forward now; I sign this bill; I give up my power; I surrender the means of perpetrating the fraud, as you allege; and call in an umpire, a third party, the legitimate tribunal of the State, to select those into whose hands I will confide these returns, and who, openly and before the public, will engage in their canvass and count these returns."

And this is a *coup d'etat*. Why, sir, there is nothing on earth that Governor Warmoth could do, for the purpose of protecting the purity of the ballot-box and of these returns, which would satisfy these people, except to surrender them into the hands of—whom? Into the hands of a board, depending for its existence upon a removed Secretary of State, or alleged Secretary of State, who is a defaulter; depending for its existence upon a man who, contemplating that his machinations with Lynch would be discovered, apprehended that he would be removed; because on the 8th, a week before he was removed, he goes to Douglass, and employs him to make him a seal of State, to enable him to say that he had the seal of State; imagining that the notion which prevailed in old English times, that the party who had the seal of the State had the office, was still in vogue—he goes, I say, on the 8th, in anticipation of the very fact which occurred, in order to defeat the legitimate action of the Executive in removing him, and prepares this seal, and then, when the question arises, he goes into court, and swears that he has the seal.

We proved that he had it not; and we proved that the only seal was then in the office of the Secretary of State, and his own employee had refused to deliver the one ordered by him, because he considered it criminal to deliver it to a person who did not occupy the position of Secretary of State. Because we will not surrender these returns to the board created by this man, and have them counted by him and another man named Lynch, who swears that at the meeting of the board, when the vote was put in regard to Hatch and DuPoute, the Governor being present, Wharton being present, Herron being present, and Lynch being present, he voted "No;" when all the other witnesses, interested and disinterested, swear that he did no such thing: that the vote was put; that Hatch and DuPoute were declared elected; that they were sworn in; that Lynch voted neither nay nor yea; that he acquiesced in their being sworn in; that he did not say a word until appealed to by Herron to leave, and it was only after repeated importunities on the part of Herron that he snatched up the minutes and left the room. This man, who comes here before this court and goes before the eighth district court and swears that he voted nay, (just about as true as the allegations contained in this most admirable bill,) because the Governor will not surrender the votes of the people of this State to a board created by these two persons who, after all that occurred in the Governor's office, retreated, go before the chief justice and are sworn in, representing themselves as constituting the board; because the Governor will not submit the votes of the people of this State to the scrutiny of such a board, he is charged with fraud, and that, too, by whom? This very Secretary of State himself, who was put into the position he occupied by Governor Warmoth in 1871, on the removal of George E. Bovee, and now, after he holds the office by virtue of this removal, after he has enjoyed it by virtue of this removal, after he has plead in the very suit the record of which has been brought before you the legality of this removal, and claimed the possession of the office by virtue of this removal, he turns round and says, when HE

is removed, that it is a very different thing; that the Governor has no power to remove him, although he had the power to supersede George E. Bovee, who was elected Secretary of State in 1868.

Now, sir, what has the Supreme Court of this State said upon the legal status of Mr. Herron? The record which I referred to before is the one where the lower court adjudicated that the Governor had the right to suspend, and an appeal being taken was dismissed, and the Supreme Court never expressed any opinion upon it; but in the case of Wittgenstein against Fairfax and Herron they did express an opinion. Wittgenstein had been appointed Assistant Secretary of State by Bovee, who had been elected Secretary of State. After the election of Bovee, and Herron taking possession of the office, the latter undertook to appoint an Assistant Secretary of State, an office created by the laws of Louisiana. That Assistant Secretary of State thus appointed was named Fairfax, and he took the place of Wittgenstein, who was then in the office. Thereupon Mr. Wittgenstein sued Mr. Fairfax, claiming to be the legal Assistant Secretary of State. What does the Supreme Court say upon the subject? The case is numbered 3905, and the opinion was delivered by Justice Taliaferro on May 23, 1872:

"The Governor is without power to appoint a Secretary of State, unless a vacancy occur in the office, and then only *ad interim*, as provided by the constitution. Conceding that, in case of the suspension of the Secretary of State from the performance of the duties of the office, the Governor would have, on general principles, the right to appoint a person to discharge the duties of Secretary of State, upon which we express no opinion, the person so appointed would be clothed only with ministerial duties, such as arise in the usual routine of office business. The Secretary of State is vested by law with the power to appoint an Assistant Secretary of State. This is not a mere ministerial duty. The person charged with the performance of the ministerial duties of the Secretary of State, during his suspension from office, is without power to remove from office, and much less without the power to appoint to office, an Assistant Secretary, for the reason that he himself is not Secretary

of State. The appointment of Fairfax to the office of Assistant Secretary of State by Herron is therefore nugatory and without effect. Wittgenstein's right to that office was in no manner impaired by the action taken in the matter by Herron. The suspension of Bovee from office by the Governor did not affect the right of Wittgenstein to discharge the duties of the office of Assistant Secretary of State, and the ejection of the latter from office was without warrant or authority of law. We think the judgment of the court *a quo* erroneous."

Now, sir, in a matter of this sort, it is not necessary for me to cite authorities to show that the courts of the United States will always follow, in regard to the construction of State constitutions and State laws in reference to the offices of the State, the decision of the highest tribunal of the State. Here, then, is a decision of the Supreme Court of the State of Louisiana, to the effect that all that was effected by the Governor was the suspension of Bovee from the discharge of the duties of the office of Secretary of State; that notwithstanding his suspension, he remained and was and is Secretary of State; that the appointment of Assistant Secretary of State belongs to the Secretary of State; that therefore Herron, being appointed by Governor Warmoth during the suspension, was only authorized to discharge the ordinary routine duties of the office. The appointment of the Assistant Secretary not being a mere ministerial duty, and Herron not being Secretary of State, but Bovee, Herron had no right to remove Wittgenstein and appoint Fairfax. There was no vacancy in the office of Secretary of State, Bovee still filling it, notwithstanding he was paralyzed by the suspension by the Governor in executing physically its duties. What is the result? That this man, who claims to be Secretary of State, notwithstanding he got possession by the removal of his predecessor and his own appointment by the Governor, was nothing more nor less—there being no provision of the constitution of the State regulating the power of suspension—than a mere clerk, selected by the Executive, from the necessities of the case, to discharge the routine duties of the office of the Secretary of State, which

never was made vacant by the suspension, and which Bovee filled then and fills now: only his power is paralyzed by the suspension. If this be the proper view taken of this fact, what right has Herron, being a mere clerk, to question the power of his master to discharge him? I repeat the word—*master*. He holds no office; the Secretary of Stateship is an office. Bovee holds it in a constitutional view, but he is not discharging the functions of it. Herron discharged them for a time; he did it as the clerk of the Governor. His master put him there, his master removed him; he holds no office; he has no tenure; it is undefined by law; it has no term; it has no legal existence so far as the statutes of the State are concerned; and therefore it is a temporary employment of a clerk to perform temporary duties. He is in the position of a clerk in a store, whom his employer can at any time discharge: and yet he goes off and has a seal made, as if he was invested by the people of this State or by the laws of this State with the office, which he had a right to hold in spite of the removing power of the Governor. Therefore, away with this man Herron, either as to fact or as to legal power.

But, sir, what are the facts that occurred when this board assembled? They talk about schemes of fraud on our part. What did they do! On the 12th of November they convoked this board, and immediately Mr. Lynch and Mr. Herron, in pursuance of the scheme they had evidently been concocting, (for I speak by the minutes,) moved that the vacancies in the places of Anderson and the Lieutenant Governor, who were incompetent to serve in consequence of being candidates at the election, should be filled. The Governor, taken by surprise, seeing the scheme which these parties had in view, fought for a postponement, and after some debate it was postponed to the thirteenth. The Governor, on the thirteenth, paralyzes this man Herron by removal. They meet at the board; he calls in Jack Wharton, whom he had appointed as Secretary of State, and who shows his commission. Herron, notwithstanding his removal, with the impudence of a man who will engage in

anything for reward, made an effort to put the proposition that Longstreet and Hawkins should be selected. The Governor thereupon stopped him, and said, "You have nothing to do here. I propose Hatch and DuPonte." The vote is taken: Herron voted No, so he says; the Governor voted Yes; Lynch said nothing. Hatch and DuPonte were immediately called in; they were sworn in, Lynch saying nothing, still seated at the table. Herron, seeing they were sworn in and that he no longer could be of any use in carrying out the scheme which they had in view, calls Lynch away, who takes off the minutes with him, thinking that the minutes, like the seal, constituted the board, and proceeded to the office of the chief justice to be sworn in as a board, without having convoked the board, without having asked the Governor to assemble to constitute the board; and they set themselves up as being the legal board. Now, if there is any principle of law that is well settled, it is the principle which governs this point. I am arguing upon the supposition that Mr. Lynch did not vote, but that the Governor did; admitting that Mr. Jack Wharton did not vote, or was not authorized to vote, though he did. The minutes are that Mr. Jack Wharton voted also; but throw Jack Wharton out and throw Herron out, then the only two remaining officers were the Governor and Mr. Lynch, two legally constituted officers. The one puts a vote, and votes for certain individuals: the other sits silent and says nothing. They are sworn in, and he says nothing. I say, sir, that that is an election. In 2 Burrows, page 1018, is laid down the following:

"At this meeting the mayor nominated Mr. Seagrave, which none then opposed; the vote was taken, and nine voted for Mr. Seagrave; after which ten or (as it is said) eleven protested against any election at all at that time. But mere silence is not a negative, either express or implied, and as no other person was proposed, and nine voted for him and none against him, he was well elected."

That was the argument of the counsel.

"Lord Mansfield saw no doubt in this case. Here was an assembly duly summoned, one candidate was named;"—

The only names mentioned in this case were those of Hatch and DuPonte: Governor Warmoth prevented any other from being named:

—"they had no right to stop in the middle of the election. The mayor did not put any question for adjournment, nor was there any. * * *

"Lord Mansfield confirmed his former opinion. He said the protesting electors had no way to stop the election when once entered upon, but by voting for some other person than Seagrave, or at least against him; whereas here they had only protested against any election at that time."

"Mr Justice Wilmot: There was a case of Rex *v.* Withers, (Pasch., 8 G. II, B. R.,) where out of eleven voters five voted and six refused, and the court there held that the six virtually consented."

"In the case of Regina *v.* Boscawen, (P. 13, Anne R. R.,) (*in Truro,*) where ten voted for Roberts and ten for Boscawen, a non-inhabitant; the votes given for the non-inhabitant, where inhabitancy was necessary, were holden to be thrown away. So in the case of Taylor *v.* Mayor of Bath, (Temp. Ld. Ch. J. Lee, B. R.")

"Lord Mansfield: Whenever electors are present and don't vote at all, as they have done here, they virtually acquiesce in the election made by those who do."

That case is again reported more fully in the 1st William Blackstone. Suppose an election should be proclaimed in New Orleans for mayor to-morrow, and we, believing that there is a mayor already elected, or for some other cause do not choose to go to the polls, and it turns out that we are mistaken, and that really an election should have been held to-morrow; and suppose that two men go to the polls and vote for Mr. A. B., and all the balance of the people of the city refuse to go and protest against it, those two votes would elect the mayor, notwithstanding the fact that the balance of us protested against it; for the only mode by which a man can protest against any election is to go to the polls and vote against the candidate presented. There is no such thing as protesting against an election; and the only way in which you can defeat a man is to vote against him, or to put up another candidate for whom you will vote in preference. You cannot say that you will not vote at all,

because those who do vote will decide the question. You cannot file a long protest, because protesting is not the way of defeating the candidate who is nominated: you must vote in the negative. Therefore the principle is, that if all the electors were present in an assembled body, and if only one man votes upon a proposition and the others are silent, the proposition is carried. And mark, sir, that Mr. Lynch sat still and saw these men sworn in by Judge Cooley, who testifies to the fact, without making any protest, or undertaking to make any remark upon the subject, without moving any reconsideration of the vote, which he had a right to do, I presume, under parliamentary rules. He does nothing of this kind, but simply takes possession of the minutes, after repeated importunities upon the part of Herron to leave the room, and abandons the place where he should have remained to discharge his duties there by voting in the negative, moving a reconsideration, or by taking some other step which he might consider necessary to vindicate his rights as a member of that board. He does nothing of that sort, but acquiesces entirely, so far as his conduct is concerned, in what had taken place. Then these people assemble together; they go before the courts, and they swear that they are in the possession of the offices of commissioners of election—swear, sir, to a fact which is legally untrue. I say it is untrue, because they say they are in possession and claim to be what is called the *de facto* board; as if, sir, there could be a *de facto* officer under any government who is not physically in possession of the archives and papers of the office, and who is not physically discharging the duties of the office, and who, in the discharge of those duties, is not recognized by the highest power—that is, the Executive of the State or of the nation, who has the army and navy at his back to enforce the exercise of the duties of that office. The *de facto* officer is the one recognized by the Executive of the State, who enforces that recognition by physical power. That is the *de facto* officer; that is the one who is in possession. In this particular case this argument applies with extreme force, because the very law creating this

board declares that the returns of the election shall be transmitted—to whom? To the board? No. One copy to be sent by a special messenger to the Governor; the other to be transmitted by mail to the Governor. What is the Governor to do? The Governor, then, in possession of these returns by law as the Chief Executive of the State, is called on, and he only, to open those returns in the presence of this board, and submit them to their scrutiny.

The Governor is thus vested with the power of recognition, for the board that he opens the votes before is the board recognized by him. The Governor, then, is not only vested with the power of recognition, but also with the physical power of carrying out his recognition; and if the board recognized by him, if the board having the physical power to carry out its orders and decrees, is not the board *de facto*, I know not, sir, what a *de facto* officer is. Therefore, so far as that question is concerned, I hold that the courts of the United States have no right to decide who is or who is not a State officer, and certainly they have no right to do it in a collateral way. Here, in the course of this investigation, it may become necessary, in another view of the case, to determine which is or which is not the legal board of returning officers. They have no right to have that question determined collaterally, either in the State courts or in the federal courts. The only way in which the right to office can be tried is, by the writ of quo warranto in the federal courts, or by a petition, filed by the Attorney General, in the State courts. All courts are bound to recognize the officer in the actual exercise of his office, and cannot allow the question of who is or who is not the legitimate officer to be discussed or entered into in any suit wherein the question may come collaterally before them. Is it necessary for me to refer to decisions to establish that proposition? Is it not a conceded proposition, that the right to hold office cannot be tried collaterally, but that it must be by a direct action and by writ of quo warranto? I will refer to some authorities: 42 Alabama, 491; 25 Arkansas, 336; and in this State the Supreme Court decided (in 21 Annual, p. 655)

that the right to office can only be contested by a writ or suit brought by the Attorney General; and in Michigan it was held that a writ of mandamus was not a proper proceeding to contest the right to office; and the Supreme Court of the United States (in 3 Wallace, 236) held that the writ of quo warranto could not issue, except in the name of the sovereign. That was a case where the officer of a Territory was supposed to be in office illegitimately, and a suit in the nature of a writ of quo warranto was brought in the name of the Territory. The Supreme Court decided that, the Territory not being a sovereign, the suit should have been brought in the name of the United States, and reversed the judgment which had been granted in the lower court. In order that your honor may see the extent of that decision, I will read a part of it:

"The writ of quo warranto was a common-law writ. In the course of time it was superseded by the speedier remedy of an information in the same nature. It was a writ of right for the king. In the English courts, an information for an offense differs from an indictment chiefly in the fact that it is presented by the law officer of the Crown, without the intervention of a grand jury. Whether filed by the attorney general or master of the Crown office, and whether it relates to public offenses or to the class of public rights specified in the statute of 9 Ann., ch. 20, in relation to which it may be invoked as a remedy, it is brought in the name of the king, and the practice is substantially the same in all cases. Any defect in the structure of the information may be taken advantage of by demurrer. In this country the proceeding is conducted in the name of the State or of the people, according to the local form in indictments, and a departure from this form is a substantial and fatal defect. In Wallace *v.* Anderson, this court said that the writ of quo warranto could not be maintained except at the instance of the Government; and as this writ was issued by a private individual, without the authority of the Government, it could not be sustained, whatever might be the right of the prosecutor or the person claiming to exercise the office in question. In the case of the Miners' Bank *v.* The United States, on the relation of grant, the information was filed in the name of the United States in the district court of Iowa Territory. The sufficiency of the information in this

respect does not appear to have been questioned. A State court cannot issue a writ of mandamus to an officer of the United States. 'His conduct can only be controlled by the power that created him.' The validity of a patent for land issued by the United States 'is a question exclusively between the sovereignty making the grant and grantee.' The judges of the Supreme Court of the Territory of Nebraska are appointed by the President and confirmed by the Senate of the United States. The people of the Territory have no agency in appointing, and no power to remove them. The Territorial Legislature cannot prescribe conditions for the tenure or loss of the office. Such legislation on their part would be a nullity. Impeachment and conviction by them would be futile as to removal. The right of the Territory to prosecute such an information as this would carry with it the power of a motion without the consent of the Government from which the appointment was derived."

Therefore, for this court to enter into a discussion as to who is or who is not the legal returning board, and to determine it in this collateral way, is not only violating the general principle of law, that no court can determine the right to office except in a direct action, but is violating the further principle, that no other than the government which created the office and appointed the officer can institute the proceedings, no matter what officer it may be. This has been decided, under the usurpation act, by the Supreme Court of this State, and this is the law everywhere. Indeed, until the usurpation act of 1868 was passed by the Legislature of this State, there was no proceeding known to the laws of Louisiana by which usurpation into a public office could be tried, the code of practice having confined the relief exclusively to officers of corporations. The article of the code of practice expressly defines public offices to be, offices emanating from the Governor, by and with the advice and consent of the Senate, or without it, and says that they would be provided for by special laws; but until the act of 1868 was passed there was no remedy for usurpation of a public office. There was a remedy for a man who claimed to be elected to contest the election in a particular way, and thus claim the office; but there was

no remedy for a man who had been put in possession of the office and was then excluded from it by somebody else, until the usurpation act of 1868 was passed. Therefore, I say, sir, that they are asking you to issue a writ of quo warranto, by an injunction enjoining these State officers from performing these functions imposed upon them by the law; and to issue an injunction based upon the principle that these defendants are not the legitimate board, would be deciding a question over which you have no jurisdiction, and a question where, in the administration of the law, your honor is bound, like the courts of the State, to recognize the *de facto* officer until he is displaced by a legitimate judgment in a legitimate proceeding. This power of contesting an election, may it please your honor, is not a judicial power, except in so far as it may have been by express enactment submitted to the arbitration of the court by the legislative power of the government. That principle, sir, as part of the jurisprudence of Louisiana, has been settled by an adjudication of the Supreme Court of this State.

[The judge here left his seat for a few minutes. After he had resumed his chair, Mr. Semmes continued his argument.]

May it please your honor, I had laid down the proposition that the power of counting votes incidental to contesting an election, and consequently of bringing suits in regard to contested elections, was not in the nature of judicial power, but that by its nature it was administrative, and only became subject to the judicial authority to the extent to which it had been subjected to the scrutiny of the judiciary by a special enactment of the legislative branch of the Government. I take and present this view, for the purpose of making this application: That if the power be of the nature I have described, not in itself judicial, but only made so to the extent to which it has been confided to the judiciary by enactments of the legislative departments of the government, even then it can only be exercised in the manner and in the mode indicated by the legislative department; and

the only mode by which a scrutiny into an election, or by which the results of an election can be inquired into, under this act of Congress, is, in a suit instituted by a *defeated candidate, after the result of the election is declared, to recover possession of an office, upon the ground that he was defeated by the exclusion of votes by reason of race*, color, or previous condition of servitude. And the circuit courts of the United States cannot exercise their power, either by bill in chancery or otherwise, unless the suit be for possession of the office. I hope that I make the proposition understood as clearly as I have it in my own mind. It is, to repeat, that it is not in the scope of judicial power to inquire into an election; that it is in its nature an administrative function; that suits for office, which necessarily involve an investigation into an election, did not exist anterior to laws authorizing the courts to make these investigations, and then only to the extent which the legislative department had seen fit to authorize the judiciary to act, and only in the mode in which it is authorized to make such investigations. I will read from 13th Annual (p. 90) the opinion of Judge Spofford in the case of the State of Louisiana on the relation of O. S. Rousseau, praying for a mandamus against the judge of the second judicial district court. That was a case where, through an omission in our election law, the district courts of the State had been granted no power to entertain controversies looking to the judicial scrutiny of votes for the office of judge of the second judicial district.

Judge Spofford says:

"If the statute under which he attempts to proceed does not embrace his case, he is without a standing in court. The contesting of votes is not a judicial function, only so far as made such by special statutes. Indeed, some may have gone so far as to question whether this is not wholly a matter of administration, which cannot with propriety be referred to the judicial tribunals at all. At any rate, it is clear that such tribunals cannot usurp any greater control over this business than is specially imposed upon them by law. In the absence of a statutory authorization, they are without jurisdiction of the matter, *ratione materiæ*. The

consent of parties cannot give jurisdiction, and all courts before whom such an unauthorized controversy is brought must decline, *ex officio*, to render any order which would recognize a right to sustain the case."

I have referred to this case to show that this is a special jurisdiction, the result of special enactments, and can be exercised in no mode except the mode designated in the statute, and to no extent beyond the limits therein described. To enforce that provision there is a principle of law which declares that neither the courts of the United States nor of the State will interfere to control the action of officers charged with the exercise of those public duties which are discretionary in their character. Now, this returning board, as a board, is a court. The case upon which the court is authorized to decide is made up upon affidavits, sworn to by three citizens, accompanied by the statement of the supervisor of registration; the case is submitted to the board; they then examine it, and if they think that there has been such interference with the elective franchise as to require that the matter should be really and seriously considered, they form themselves into a court; they are authorized to send for persons and papers; they make an investigation, and upon the result of that investigation they announce a judgment, and that judgment is executed by either rejecting or retaining the poll which has been questioned.

Here, then, is a case of the exercise of an important public function, an administrative function by administrative officers, in which the duties are not simply ministerial, for the board is invested with a large and most extraordinary discretion. You are not only asked to enjoin us as the legitimate board from acting at all, but you are invoked through the instrumentality of an injunction—an injunction made a part and parcel of a bill for the perpetuation of testimony, a matter unheard-of in a court of chancery—to stop entirely the wheels of the State government. I say, without the fear of contradiction, that there was never before a bill to perpetuate testimony accompanied by an in-

junction. You are asked, sir, to prohibit us from going on and performing these great administrative public functions; and we contest your right to do so, first, upon the specific ground that you cannot investigate the right to office in this way, and then upon the general ground that a court of chancery ought not to interfere with the administrative duties of public officers in regard to elections. In 48th Illinois, page 489, this question came up. There they wanted to stop the election altogether. And what are you doing here? This restraining order is stopping the machinery of this State; this restraining order is practically arresting the State government. If the theory for which the learned counsel on the opposite side contend be sustained, that you have this power to interfere, then there can be a declaration of the election made by nobody. One side being prohibited by the State court and the other side prohibited by the Federal court; and there is no legislative department of the government in existence to-day. The terms of the members of the Legislature expired on the 4th of November, 1872, and no declaration in the mode pointed out by law, as contended for by the counsel on the other side, can be made. I allude to this, may it please your honor, for the purpose of showing you that, if this power of injunction is to be exercised, it will paralyze the State government, which was not contemplated by the act of Congress. The act of Congress contemplated that the election should be declared; that the officers should take possession; and that if a party was defeated in consequence of the exclusion of votes on accourt of race, color, or previous condition of servitude, he would have the right in the Federal court to contest. That does not paralyze the State machinery; that does not raze the very foundation of the Federal Government, the existence of States; that does not render the State, so far as all its organs are concerned, a perfect hermaphrodite, without a legislative department. No result of this sort would come from a proper mode of exercising jurisdiction under the constitutional amendments; but this mode proposed here seizes upon the power to determine who are

the legitimate State officers; seizes upon the power to arrest all the machinery of the State government; and seizes upon the power, not necessary to the proper interpretation of the constitutional amendments and not granted by Congress, to control the officers of the State Government in the discharge of their public duties. A court of chancery will not do it. I read from 48 Illinois, page 489:

"If it be meant that a court of equity can grant a temporary injunction to stay the election or prevent the officers elected from acting,"—

As your honor has done by your restraining order in this case in regard to McEnery,

—"until a final hearing, the grounds are not well taken. A temporary injunction is but a matter of discretion, and a court would hesitate long before granting an injunction to stop the holding an election, or to prevent an officer from entering upon the discharge of official duties, even if equity had jurisdiction, at least until after the final hearing of the case. We are aware of no well-considered case which has enjoined the holding of an election, or prevented an officer of the law from giving the required notices for or the certificate of election. To sanction the practice of granting temporary injunctions in such cases would be highly calculated to obstruct the various branches of government in the administration of public affairs. Courts of equity can have no such power, otherwise any and all elections might be prevented, and government greatly embarrassed."

This is not only good law, but good common sense. Congress gave no power to grant mandamuses or injunctions to interfere with State officers in counting the votes or giving certificates of election. Congress, sir, recognized the principle, that there should be no such interference; that it was better to let the fraudulent result be announced, and let the officer go into office and discharge its duties, than to arrest the entire action of a State government, allowing the party of course his remedy, either in an action for damages by bringing a suit to recover the possession of the office and vindicate his rights, or by indicting the party for a criminal act, which could have been done. This principle, sir, is

enforced by the courts of the United States—by the courts everywhere.

In Abbott's N. Y. Reports, 2d volume, New Series, page 290, the court says that even in suits between parties contesting for the right to an office it will not grant an injunction to stop an officer *de facto* from performing his functions. I will read the decision referred to:

"I think there can be no doubt that in actions to oust persons exercising the duties of public offices under a claim of right, a temporary injunction restraining them from exercising the duties of the office pending the litigation will not be granted. I have looked in vain for a single case recognizing such a right. The reasons for refusing an injunction, in such cases, are clear and powerful. The exercise of the duties of offices are necessities to the public welfare. Unless the officer *de facto* is permitted to discharge the duties, they cannot be discharged until the end of the litigation and the legal title is determined."

If you have the right to grant this injunction, and the State court has the right to grant the other injunction, what is the result? That things remain in *statu quo* until the ultimate decision of this case, which may be some three years after it has reached the Supreme Court of the United States. It will be decided, perhaps, after Mr. McEnery, the legitimate claimant of the office, may be in his grave or three-fourths of his term expired. The result will be that state of things which these men proclaim would be the greatest evil that the world ever saw. The result would be that which the learned counsel says has produced a condition of things in this State which is perfectly intolerable. The result would be that which he says all good men abhor. The result would be that this "fraudulent Executive," with his *coups d'etat*, would remain in possession of the Governor's office pending this long litigation.

I will read further from the authority I have just quoted:

"Unless the officer *de facto* is permitted to discharge the duties, they cannot be discharged until the end of the litigation and the legal title is determined. This, in many

instances, might involve a long time, and the public might suffer serious injury, loss, and inconvenience."—

As they undoubtedly would in this case, in the estimation of the learned counsel on the other side.

—"In frequent cases it might block the wheels of State, while the petty inquiry was being investigated whether one or the other of two persons was the legal incumbent, entitled to exercise the duties of the office and receive the pay therefor."

Well might the court say the petty inquiry. It is so petty that, in my humble judgment, no court in this land has jurisdiction to consider the question who is or who is not the legal board of returning officers for the State of Louisiana, and that the Legislature has not vested the power in any one. Why? Because they are but special commissioners, appointed at different periods to discharge a special duty, and become *functi officii* as soon as the duty is discharged, without emolument. No amount is involved in the right to this office, if it be an office, because there is no emolument; and the jurisdiction of the district courts of this State is confined to matters where the sum of over one hundred dollars is involved. It is no office; because the Supreme Court of the United has defined an office to be a parmanent discharge of public duties by a person who is an officer of the Government; and here is no permanent discharge of public duties. Every time that an election takes place under this election law, these men have to appear and take a new oath, and discharge the duties of returning officers as to each election. If it be an office, then neither Herron, nor the Governor, nor the Lieutenant Governor, could hold it; because article 117 of the constitution declares that "no person shall hold or exercise at the same time more than one office of trust or profit, except that of justice of the peace or notary public." These officers are special commissioners, appointed at intervals, for a special purpose, and at special times. The law creates a special and peculiar court, from which there is no appeal. Therefore the subject-matter is not within the jurisdiction of any court,

because the intrusion act is confined to officers; and it is not an office, for the reason that I have stated, nor is it the exercise of a franchise. Although the judge of the eighth district court did, in his opinion in regard to this subject-matter, intimate that a court might entertain jurisdiction over this question, because these men were exercising a franchise, he totally misapprehended the character of a franchise. A franchise is in the nature of a grant made by the government to a citizen, giving him peculiar privileges; it is in the nature of a privilege; it is a contract between the citizen and the government, which in the celebrated case of the Darmouth College was held to be a contract which could not be violated by the State. Offices, under the political theory of this country, are not hereditaments, as they are styled in the English law-books under the English system; but they are considered as mere powers, to be exercised for the benefit of the public.

Therefore this office is not a franchise in the sense in which that term is used in the law of 1868, in regard to the unlawful exercise of offices or franchises. Therefore, sir, I say that there is no court that can take jurisdiction over the subject to determine who is the legal board; that a member of it is not an officer; that he is a mere commissioner, such as the Supreme Court of the State of Louisiana held him to be when, in the olden times, in an effort on the part of a Democratic Legislature to repress the violences incidental to a party, at that time termed the "Know-nothing party," they created a central board of election in this State, and Mr. Moise, then Attorney General here, having been, by the enactment, made one of the commissioners, the question came up before the Supreme Court of the State whether or not he could exercise the duties of commissioner, the objection being that it was an office, and that it was incompatible with his position as Attorney General. The Supreme Court of the State held that it was not an office; that he was performing duties simply as a special commissioner, and that therefore it was not incompatible with the position which he held as

Attorney General of the State. I allude to this for the purpose of showing that these commissioners of election, appointed only at a time when an election is held, are not officers in the sense contemplated by the law which authorizes suits to be instituted for ejectment from office. It is important that courts should not have jurisdiction over such matters, because it is manifest that a corrupt judge could easily put in whom he pleased and put out whom he pleased, without any appeal to the highest tribunal of the State, because the amount involved in the contest for the position would not reach five hundred dollars, there being no emolument attached thereto. It was never intended to place any such power in the hands of any inferior tribunal. Therefore, sir, I say this question is entirely beyond your jurisdiction; you have not the right to make any inquiry into it at all. All you are authorized to do is to recognize Governor Warmoth as vested with control over this matter of determining what board is the legitimate board. Notwithstanding that efforts have been made, as I have been told, to produce the opposite result, in the interest of those engaged in the conflict in regard to this election, still Governor Warmoth is recognized by the Chief Executive of the nation as the legitimate Governor of this State, and as such in the discharge of his duties; and you are bound to recognize him, and to recognize those persons as officers whom he recognizes as officers *de facto*, particularly when the law, under which in this case he recognizes DuPonte and Hatch as the legitimate officers, gives him the right, the political right, without control over him by any court, (because no court has jurisdiction, as I have shown,) to determine the question as to which is and which is not the legitimate board of returning officers. He alone is authorized to declare before whom he will open the returns; he is the one to whom the returns are transmitted, and who acts as their custodian, and it is through him that they are submitted to the board for examination. What that board shall be, and of whom it shall be composed, is fixed by law; and no matter what

person the Governor determines shall occupy *de facto* the office of commissioner, there is no tribunal in this land that can revise his judgment.

It is unnecessary for me, may it please your honor, to read authorities to show that there is no presumption of jurisdiction. The Supreme Court of the United States has held that there is no such presumption, and that it must be established affirmatively. (4 Dallas, 8; 5 Cranch, 153, &c.) Nor is it necessary for me to read authorities to show that the jurisdiction of the circuit courts is special. They have no probate jurisdiction, and cannot determine any matters in regard to divorce. (18 Howard, 350; 21 Howard, 352.) These authorities are mentioned to meet the proposition of the counsel on the other side, that this was a general equity jurisdiction that this court was called on to exercise under these constitutional amendments.

A court of chancery will not enjoin an officer in the performance of the duties of a public office not merely ministerial. (1 Cranch, 166; 12 Peters, 524; 14 Peters, 497; 6 Howard, 100.) It is unnecessary for me to read the authorities on this point; the law is too plain.

The most recent case on that point is 7 Wallace, 487, where an effort was made to enjoin the Secretary of War, and the court said there was no authority for it to control him in his action. A court will not enjoin the performance of public duties by any public officer.

I also refer your honor to 6 Wallace, 407, and the case of the State of Mississippi against President Johnson, in 4 Wallace. There an effort was made, upon the ground that the reconstruction acts of 1867 were not constitutional, on the part of the State of Mississippi, to enjoin President Johnson from the execution of those laws. The Supreme Court of the United States said it would not entertain jurisdiction over the case, for the reason, among others, that a court of chancery never does interfere to arrest a public officer in the performance of his public duties.

Now, sir, the argument which I have addressed to your honors presupposes that this board which your honor has

enjoined, and which the State court has enjoined, is in existence. I deny the proposition; and if I succeed in maintaining that the law creating this board is repealed and the board annihilated, I presume that, whatever may be the views of your honor on every other subject connected with this case, you must refuse to grant this injunction, for the reason that the only board against which the injunction is asked, the only board which it is charged is going to commit these enormous frauds, is the board composed of Hatch, DuPonte, Wharton, and the Governor, which has been dissolved. Now, if the Governor has voluntarily cut off his own head and the heads of his colleagues, so as to do away entirely with the pretense of fraud charged in the bill, why of course that is an end to the case. I presume that is a manifest proposition; so manifest, that you honor seized upon it in advance, and was perfectly amazed, no doubt, at the learned counsel who opened the case touching so lightly upon it, because it saves all of this lenghthy investigation. I have been compelled to argue the case as I have done, because the leaned gentlemen on the other side have already thrown out an intimation that this *coup d'etat*, as they call it—this exercise of a constitutional function, as I call it; this act for which Governor Warmoth should be imprisoned, as they say; this act of the Executive of the State, which he could not have performed in the exercise of his discretion, as I say;—was not intended in earnest. As if the Governor of this State had merely for a little side-play signed a bill, and that the parties were playing with one another a mere game, without reference to practical results. That was the intimation that was thrown out.

I say, sir, that that law was signed with no other object in the world than to throw the question of who is or who is not elected into the hands of the men charged on neither side with fraud. That law was approved by my advice, and for that purpose; and if I fail to accomplish the object contemplated, the reason will be two-fold: First, my want of knowledge of the profession, as to what the effect of it would

be; second, my want of judgment in regard to what I supposed would be the result, which was, that both the contesting boards would come in and say, "Now, let this new board be elected by the Senate, and let us settle this unseemly controversy and cease this bickering, and put an end to these charges of fraud and criminations and recriminations." But, sir, the peace offering which has been made is rejected with taunts and with scorn; it is rejected by the insinuation that it is a mere *coup d'etat*, made with the object to gain some mere political advantage over a political opponent. Having been met in that spirit, the only thing left here for us to do is to assert our legal rights before this court, and to present them in the manner in which they have been presented to the minds of counsel engaged in advising the Governor as to the effect of that law, and let your honor determine who is right and who is wrong. Remember that this olive branch was held out under these circumstances: that the new law expressly provides, that this board to be created shall be selected by the Senate from men composed of both political parties—of *all* political parties. In this case there would be, I suppose, a straight-out Democrat; there would be a Liberal Republican; there would be a Radical Republican; and then there would be some sort of a fusion man, as they call it; then—I forget what other names they have—but all the varieties of political parties would be represented. This is the proposition we now offer; this is what we are now seeking to accomplish by asking your honor to stay your hand. All that we ask is for the United States Government to stay its hands: let this new and impartial board thus selected under the new law go into operation, examine the returns, and proclaim the result. They refuse the proposition: we ask your honor to enforce it.

In the first place, I have authorities to the effect that a law of the State of Louisiana may take effect from and after its passage without promulgation. I produce these authorities, as I do not know what questions might hereafter be raised. I refer to 2d Annual, p. 86; 8th, New Series, p. 843; 13th Annual, p. 502; 14th Annual, p. 486.

In the second place, that the Governor of this State is authorized to sign a bill during vacation. (Belden *v.* Hagan, [The Slaughter-house case,] 22d Annual, p. 548.) There the Supreme Court settled that proposition. The next question is, what is the effect of this new law upon this board, or upon the law creating this board? The act is act No. 98, and is entitled—(I read from the New Orleans Republican)—

"An act to regulate the conduct and to maintain the freedom and purity of elections; to prescribe the mode of making returns thereof; to provide for the election of returning officers, and defining their powers and duties; to prescribe the mode of entering on the rolls of the Senate and House of Representatives; and to enforce article 103 of the constitution."

Now, the repealing clause is as follows:

"*Be it further enacted, etc.*, That this act shall take effect from and after its passage, and that all others on the subject of election laws be and the same are hereby repealed."

There is no question, therefore, that the Legislature intended that this law should repeal all other acts of a similar character. There is nothing said about laws in conflict with this, nothing about revision, nothing about amendments. They embraced in one comprehensive system, under this act 98, all the law regulating the subject of elections in this State, and repealed all other laws on that subject. This, then, is the law of the land. The second section provides as follows:

"That five persons, to be elected by the Senate from all political parties, shall be the returning officers for all elections in the State, a majority of whom shall constitute a quorum, and have power to make the returns of all elections."

So that it creates a board in an entirely different mode from that adopted in the preceding law. That act recognized as members of that board certain parties by name, to wit: T. C. Anderson, John Lynch, and the Governor, the Lieutenant Governor, and the Secretary of State, *virtute officii*. The Legislature itself, I say, selected by name two of the

members of this returning board, and designated certain officers as constituting the other three. This last act throws the duty upon the Senate of selecting this board from time to time, and declares that it shall be selected from all political parties. There is no term to the office or to the performance of its duties. The election must be held by the Senate every time a State election takes place; whereas under the old law Anderson and Lynch were permanent members, and the other three were members as long as they remained in their places as Governor, Lieutenant Governor, and Secretary of State. These are the differences in the constituent elements of the two boards. Your honor will perceive that this law contemplates at every election a fair return, through the instrumentality of persons selected, for the time being, by each successive Senate. Now, why is it that this law, which is explicit, does not repeal all preceding acts? The gentleman referred me to a case in the Supreme Court of the United States, reported in 2 Wallace, which has nothing whatsoever to do with the principle involved in this case. What is that case? A pilot, who exercised a certain authority under an act of 1861, in California, had performed certain duties, for which he was entitled to so much compensation. A subsequent act repealed that law, and instituted a new mode of piloting. He, having performed the services while the previous act was in existence, claimed his compensation. The Supreme Court very correctly decided that the repeal of the law, by which the mode of pilotage was changed, in no manner affected his right to his compensation, which had accrued under the act which was in force at the time that he rendered the services. I would not contend for the opposite proposition. In the course of its decision the court says:

"And it is clear that the Legislature did not intend, by the repealing clause in the act of 1864, to impair the right to fees which had arisen under the original act of 1861. The new act re-enacts substantially all the provisions of the original act relating to pilots and pilot regulations for

the harbor of San Francisco. It subjects the pilots to similar examinations; it requires like qualifications; it prescribes nearly the same fees for similar services; and it allows half pilotage fees under the same circumstances as provided in the original act. It appears to have been passed for the purpose of embracing within its provisions the ports of Mare Island and Benicia, as well as the port of San Francisco; of creating a board of pilot examiners for the three ports, in place of the board of pilot commissioners for the port of San Francisco alone, and of prohibiting the issue of licenses to any persons who were disloyal to the Government of the United States. The new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them."

Therefore this is an authority for saying that if this old act is continued in force at all, in consequence of some of the provisions being the same in the new act, it is only considered in force with the modifications made by the new act; and the most important modification is that the board is not designated by the Legislature as being composed of the Governor, the Secretary of State, and Lieutenant Governor, but is to be selected by the Senate. If your honor will read the act through, you will find that it was contemplated that it should be put in operation so as to govern the election of 1872.

But, sir, it is said that this election is a unit; that the law which was in existence at the time the ballots were cast the Legislature has no power to change, so far as the counting of the votes is concerned. In other words, it is contended that the Legislature had created a board with power to investigate into the results of this election, which board has been arrested in its action; and that the Legislature, if it were to assemble now, could not put an end to this litigation, by an express enactment that these returns shall be submitted to somebody else. Is not that the proposition? Is not that the ultimate result of the principle advanced? For if the election is such a unit that it is

indivisible—that it is, like an immaterial substance, not capable of parts, and that therefore it is utterly impossible to divide it—then the Legislature cannot assemble to-morrow, (although there is no question about the legality or constitutionality of its assembling,) and pass an act which will, in express terms, take this disagreeable controversy out of the hands of the judiciary. Certainly no such construction as that will prevail. What, then, is the character of this board? Is it not, as the counsel himself admitted in the opening argument, a tribunal or court of a special character, constituted for a special purpose, to investigate into and determine these questions in regard to the returns of the election? The reading of the act will satisfy any inquiring mind that that is the nature of this board; that it is a court of special jurisdiction, created for special purposes, and exercising discretionary power in particular cases. The Supreme Court of this State has recognized as a court a similar tribunal, which is charged with the duty of registration of voters.

Now, may it please your honor, was it ever heard of in a court of justice, that when a court which is trying a case is deprived of jurisdiction over that case, it nevertheless could proceed to adjudicate it? Why, sir, one of the most remarkable cases that ever occurred in the history of this country shows how fallacious the argument is. Do you remember that under the construction of the Constitution of the United States, anterior to the adoption of the eleventh amendment, States might be sued by citizens? After that amendment was adopted, the question came up in the Supreme Court of the United States as to the effect of the adoption of that amendment upon the suits then pending in the courts. If you examine the language of the eleventh amendment to the Constitution, you will find that it declares that the article shall not be so construed as to apply to any suit of a citizen against a State. There is no prohibition, there is no repeal: it is simply an amendment, that it shall not be so construed. In 3d Dallas, p. 378, the Supreme Court of the United States held that the eleventh amendment applied to suits at the time

the amendment was adopted as well as to suits brought after it; and therefore that, in the case then pending, the Supreme Court of the United States was deprived of jurisdiction. Again, the Supreme Court of the United States has held that where an appeal is taken from a judgment, which judgment was correct at the time it was rendered, because of the law then in force, and pending the appeal the law was repealed, the appellate court is bound to reverse the judgment, because it must be a correct judgment at the time that the final adjudication takes place. That, sir, was decided in the case of Peggy, 1st Cranch, p. 180. Justice Martin, in 17 Louisiana, decided that an action begun under a law and not perfected under it becomes void. Therefore, any proceeding begun by these commissioners under this law and not perfected under it is entirely void. That this board is a court, or in the nature of a court, was decided in a case reported in 12th Annual, p. 140, in terms which seem to cover this point entirely. In order not to detain your honor much longer on this subject, I will refer you to a synopsis of all the law pertaining to the effect of repealing statutes, contained in Smith on Statutory and Constitutional Construction, section 765 and 766:

"It has been held that the repeal of a statute conferring jurisdiction took away all right of proceeding under the repealed statute, even in regard to suits pending at the time of the repeal. (Butler *v.* Palmer, 1 Hill R., 324.) This rule has been applied in regard to penal statutes, as I shall have occasion hereafter to show, and the same rule has been held as to the consequences of the repeal against a civil right, so long as it remains inchoate. Such was the case in the case of Miller (1 Blackstone R., 451.) In that case the repeal was held to work the same consequences against a civil right. Miller, an imprisoned insolvent, had been compelled to assign his property, and was entitled to be discharged by an order of the court of quarter sessions as early as the twenty-sixth of September, 1761. But the 2 Geo. III, ch. 2, had already passed, repealing the compulsory clause—such repeal to take place from and after the nineteenth of November of that year. The insolvent urged his discharge, but the sessions adjourned from time to time till after the

nineteenth, then refused to grant it, on the ground that the repealing act had taken place. On motion for a mandamus, Lord Mansfield, chief justice, delivered the opinion of the court, and held that no jurisdiction now remained in the sessions. He cited the repealing clause, which, to be sure, was very strong, that from and after, &c., the same is hereby repealed, *to all intents and purposes whatsoever*. But this, according to what was held in Surties *v.* Ellison, and other cases on the repealing clause, in 6 Geo. IV, ch. 16, was no more than a simple repeal. The first section of the 6 Geo. IV. simply repealed all the previous statutes of bankruptcy; but by the last section the section was not to take effect till the first of September, 1825. And there being no saving clause as to acts of bankruptcy committed, or any inchoate proceedings under the former acts, it was held that the court had no power to imply a saving clause, although it was plain that by a mere inadvertence in legislation the kingdom was left for a time entirely destitute of its bankrupt law. The court was pressed for a construction which might avert so great a general evil. But Lord Tenterdon said, 'We are not at liberty to break in upon the general rule;' though he admitted that it was very unfortunate that an act of so much importance should have been framed with so little care. In a previous case Best, C. J., said, that on the first of September all former acts were entirely got rid of. (Meiggs *v.* Hunt, 12 Moore, 357, 359; S. C., 4 Bing., 213.) In a subsequent case a struggle was made to save a deposition as evidence which had been taken to support a commission of bankruptcy under the former statute, (5 Geo. II, ch. 30, sec. 14,) but which deposition did not happen to have been enrolled as that section required, in order to make it admissible.''

A stronger case could not be put.

"It was in all other respects completely under the former statute; but the party inadvertently omitted the act of enrollment till after the repealing clause took effect. And the court held that no right remained even to enroll, although the repealing act provided the like power of enrollment in proceeding under itself. In short, after much consideration, the court declared that the clause operated as a simple repeal; and Lord Ch. J. Tindall laid down the rule applicable to such a case. He said, 'I take the effect of a repealing statute to be to obliterate it (the statute repealed) as completely from the records of the Parliament

as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and *concluded* while it was an existing law.'"

"Section 766. It will be perceived that the rule laid down in this and several other cases has no respect whatever to the circumstance that the repealed statute was either of a criminal or jurisdictional character. Nor is it perceived why in cases of civil rights an exception is not just as practicable in favor of a jurisdiction given to enforce the right as to the right itself. On authority then, at least, no rights arising under the repealed statute can be saved except by express reservation in the repealing statute, or where those rights have been perfected by taking every step which depended for its force on the former act."

There is a full discussion of the subject, but I extract only the cream, in order not to detain your honor or fatigue myself by reading three or four pages of similar law. Your honor need not look beyond this book for all the authorities on the subject, unless there are some which have arisen since the publication of this work. If, sir, I am right in this proposition, there is an end to this litigation, because there is nobody to enjoin. The plaintiff and the defendant are dead. The plaintiff board and the defendant board are "gone where the woodbine twineth;" and your honor therefore is relieved from the necessity of investigating this question of fraud.

But suppose I am mistaken as to that, who brings this suit? William Pitt Kellogg, a Senator of the United States at the time of his nomination, a Senator of the United States at the time of his alleged election, a Senator of the United States at the time this board was proceeding to canvass these returns, a Senator of the United States at the time of the institution of this suit, a Senator of the United States at the time of the argument of this cause. Is he in a position to question this election? Is he, under the constitution of Louisiana, entitled to this office if elected? If not, there is no use in making any investigation as to whether he was or was not elected; for, if he was ineligible at the time the

election took place; if ineligible at the time that this suit was instituted; if ineligible now, he has no interest in raising these issues, he has no interest in coming forward and making these charges. Your honor will remark that he files his bill upon the ground that he will at some future day institute a suit to claim the office of Governor. It is a promise upon his part which he is not bound to fulfill; and if he did violate his promise, I don't believe that many tears would be shed in the State of Louisiana in consequence of it. The question presented here is not only one of eligibility under the constitution, so as to render the election as to him void, but it is also a question whether or not his eligibility depends upon his own volition, taking the other view of the case. The question is, whether this court can be called upon to make an idle investigation into a complicated case, which investigation may turn out to be utterly worthless and useless, or its utility would depend entirely upon the whim or caprice of Mr. Kellogg in the future. Your honor will perceive that I draw a distinction between the two propositions. One applies to absolute ineligibility, so as to defeat him at all times for the office; the other is a question of *standi in curia*. Does he come into this court clothed in those garments which would entitle him to be considered in the investigation of this case? Is he now indued with the garment of eligibility, if I may so term it? He was at the time of his alleged election, at the time of the institution of this suit, and is now, so far as our constitution is concerned, excluded from the church. He is an unbaptized infidel, to use ecclesiastical language to express the idea. Can he come into this Christain court until he has the sign of the cross upon him, to show that he is entitled to recognition as within the fold—as being eligible to that station to which he aspires. Now, sir, what does the constitution of the State say upon this subject? Article 52 says:

"No member of Congress or any person holding office under the United States Government shall be eligible to the office the Governor or Lieutenant Governor."

Mark you, this article does not use the language used in the Constitution of the United States, which says that no person shall be a Senator or Representative unless he possesses such and such qualifications; that is, that he cannot *act* as Senator or *act* as Representative if he is not so and so. This article of the State constitution does not say that no person shall be Governor or Lieutenant Governor who holds an office under the United States Government; for then, clearly, if he did not hold such an office at the time that he qualified there would be no prohibition. The language used is, that he shall not be *eligible* to the office of Governor or Lieutenant Governor. There was another article of the constitution which declared that the Governor should be ineligible to the governorship for the succeeding four years after the expiration of the term for which he shall have been elected. That article has been stricken out, but I refer to it as being in the constitution at the time that article 52 was adopted, to show what was in the mind of the framer of the article at the time it was conceived. Another article says, that "No person shall be *eligible* to the office of Governor or Lieutenant Governor who is not a citizen of the United States and a resident of this State two years next preceding his election." So that whenever the word "eligible" is used it refers to the time of election. "He shall not be *eligible* to the office of Governor," etc.; "the Governor shall be *ineligible* for the next succeeding four years;" "no member of Congress," etc., "shall be *eligible* to take the office of Governor or Lieutenant Governor." Does that term "eligible" apply to the time that the election is held, or does it apply to the time that the party may select, at his own volition, to qualify, in order to exercise the functions of the office to which he has been elected? What need, sir, was there to place in the constitution a prohibition that no member of Congress or person holding office under the Government of the United States should exercise the office of Governor or Lieutenant Governor? Because it is a physical impossibility that they should exercise both functions at the same time. He could not be in his seat in the Senate, he

could not be a member of the Cabinet, and at the same time be the Governor. That, clearly, was not within the contemplation of the framer of the constitutional article.

If I were permitted to roam into the field of imagination, I think I could well picture the views that operated upon the mind of the person who first conceived that article; for it is but a copy from other constitutions, and preceding constitutions of this State. I can imagine that he might have seen, in the dim vista of the future, a custom-house surrounded with Gatlin guns, and United States officials in charge of a Republican convention; he might have imagined a convention assembled in some country parish of this State, presided over by the United States surveyor of this port, controlled and manipulated by the United States marshal, supported by United States employees, from whose salaries five per cent. would be exacted in order to be successful in securing the nomination of some chief officer of the United States Government. He might have imagined a convention controlled by deputy marshals, who would allow nobody to enter unless pledged to the support of a particular candidate, who would be an officer of the United States Government. I could draw a picture of influence and power which the framer of this article must have foreseen, and which he desired to prohibit or prevent, and could only do so by declaring that the person in a position to exercise such enormous power in regard to the election of proper officers of the State should not be allowed to do so in his own interest. And, sir, if I am accused of having overdrawn the picture, I think I could with safety appeal to one of the learned counsel on the opposite side to defend me from the accusation. He will testify that the picture is not merely one of imagination, or, if it be imaginary, is not overdrawn, but true to nature. I say, sir, that this article of the constitution was inserted for the express purpose of preventing the exercise of this overwhelming influence, which might be brought into play by any person high in the confidence of the United States Government, by controlling all of its

officials within the boundaries of the State, in order to secure the nomination and election of some favorite of that Government. That should be the construction placed upon the article in order to arrest this evil; and it *is* the construction which has been placed upon a similar constitutional article by the Supreme Court of California, where the question has been discussed and decided.

I read from 15th California, 118:

"Under the 21st section of article 4 of the constitution of this State, a person holding the federal office described in that section is incapable of being elected to a State office; he cannot receive votes cast so as to give him a right to take the State office upon or after resigning the federal office. The word 'eligible' in this section means capable of being chosen—the subject of selection or choice."

That is the head-note. The article of the constitution referred to is as follows:

"No person holding any lucrative office under the United States or any other Power shall be eligible to any civil office of profit under this State; provided, that offices in the militia, to which there is attached no annual salary, or local officers and postmasters, whose compensation does not exceed five hundred dollars per annum, shall not be deemed lucrative."

The court goes on to say:

"The counsel for the appellant contends that the true meaning of the constitution is, that the person holding the federal office described in the 21st section is forbidden to take a civil State office while so holding the other; but that he is capable of receiving votes cast for him, so as to give him a right to take the State office upon or after resigning the federal office. But we think the plain meaning of the words quoted is the opposite of this construction. The language is not that a federal officer shall not *hold* a State office while he is such federal officer, but that he shall not while in such federal office be *eligible* to the State office. We understand the word 'eligible' to mean capable of being chosen—the subject of selection or choice. The people in this case were clothed with this power of choice; their selection of the candidate gave him all the claim to the office which he has; his title to the office comes from *their* desig-

nation of him as sheriff. But they could not designate or choose a man not eligible, *i. e.*, not capable of being selected. They might select any man they chose, subject only to this exception, that the man they selected was capable of taking what they had the power to give. We do not see how the fact that he became capable of taking the office after they had exhausted their power can avail the appellant. If he was not eligible at the time the votes were cast for him, the election failed. We do not see how it can be argued, that by the act of the candidate the votes, which when cast were ineffectual, because not given for a qualified candidate, became effectual to elect him to office. Can it be contended, that if Grow had not been a citizen of the county or of the State at the time of the election, or had been an alien at that time, that the bare fact that he did so become a citizen at the time he qualified would entitle him to the office? Or suppose a man, when elected, under sentence and conviction for crime—if such a case can be supposed—would a pardon before qualification give him a right to hold the office? When the words of the constitution are plain, we cannot go into curious speculation of the policy they meant to declare. It may, however, have been a part of the policy of the provision quoted to prevent the employment of federal patronage in a State election."

Therefore, sir, I say that he has no right to this office, if elected; he has no right to say to the people of this State, "Vote for me at your election, and then, if I choose to take the office I will take it; if I choose to put myself in a position to qualify I will do so." It would then be a matter depending entirely upon his own volition. Why, sir, to such an extent is the doctrine carried, that a party must be eligible at the time of the election; that there are decisions of the high courts in England to the effect, that votes given for an unqualified or ineligible candidate, at the time of the election, are votes thrown away, and cannot be counted. In the celebrated case of Gosling *v.* Veley *et al.*, reported in 7 Adolphus & Ellis, N. S., the Court of King's Bench, Lord Denman, decided that votes given for a person who is notoriously unqualified are votes thrown away, and that the party qualified receiving the next highest number is elected. The same doctrine has been pronounced in the case of The

People *v.* Clute, reported in October, 1872, where the Supreme Court of New York, after a most elaborate investigation into the case, held that votes cast for a candidate by persons having notice of his ineligibility were void. That is a case in which this whole doctrine is examined. I will not tire the court by reading the decision. The point is, that ineligibility at the time of the election renders the votes cast for the ineligible candidate void, and therefore he cannot qualify himself for an office to which he is not elected, from the fact that the votes cast for him cannot be counted at all. If that be true, it is perfectly immaterial how many frauds Governor Warmoth and his board may commit, so far as this complainant is concerned.

But, sir, suppose I am wrong as to that proposition. I still take the ground that this court's time cannot be encroached upon to adjudicate future rights which may never arise. If the complainant comes here claiming that this court has equity jurisdiction to issue this injunction for the purpose of perpetuating testimony to be used in a suit that he intends to bring, he must show that he is in a position to bring that suit; he must show that he is in a position now to stand in court. He could not bring a suit for the office of Governor as long as he occupies the position of United States Senator, because he has no interest involved which would be recognized in a court of justice.

If the court should render a decree in his favor he could not take the office. He is not debarred from the office by denial of the right to vote on account of race, color, or previous condition of servitude; but he is debarred the office by virtue of the Constitution of the State, which says that no Senator of the United States shall hold the office of Governor, or be eligible thereto. He is now, being in the position of Senator, without right to bring this suit, because he is not capable of holding the office. Will your honor, therefore, allow the valuable time of this court to be wasted in going into an investigation to determine these momentous questions of fraud between these parties,

and to determine these momentous constitutional questions, and after you have done so, for Mr. Kellogg to turn around and put the decision in his favor in his pocket and go away from the State, because he does not choose to be qualified and resign his office under the United States? It is a different case where a man is qualified at the time of his election. He can go into a court of justice to have his right asserted, and then if he does not choose to exercise it, it is his business; but his right is a personal right; it is a vested right. The decision of your honor now would not be in favor of any personal or vested right, or of any existing right; but in favor of a possible condition of things which may or may not arise. It seems to me that under the decision of the Supreme Court of the United States in the case of Cross and Du Valle, reported in 1st Wallace, this court is not going to lose its time upon the adjudication of prospective, contingent future rights. The book is not here, but I assert the proposition. It was a case where the parties called upon the court to decree what would be their rights on a future contingency; and the Supreme Court of the United States cited with approbation the opinion of Lord Justice Turner, of the Court of Chancery Appeals of England, to the effect that the time of the court must not be allowed to be wasted in the adjudication of future rights, but that the party seeking relief must have some vested right at the time.

Now, may it please your honor, I believe I have discharged the duty which was imposed upon me in the opening of this case on behalf of the defense. I have presented all the law which I think we will present, so far as the principles which I contend for have been discussed. What I have to say in conclusion is this: that upon a motion for an injunction, the universal rule in chancery is that the court will not intervene to restrain any one from acting merely upon the allegation that certain apprehended frauds are about to be committed, without specific allegations and proof, outside of the mere allegations, of the

frauds which it is apprehended the party will commit. I read from 7th Robertson's New York Reports, 280:

"The bare allegation of a fear that defendant is about to do some act, without alleging the facts and circumstances which *prima facie* justify such fears, will not authorize an injunction to restrain the commission of an apprehended act."

The other principle to which I desire to call the attention of the court is, that on a motion for an injunction, where the affidavits and the answer deny all the allegations in the bill, the injunction, if issued, should be dissolved; and, of course, on a rule *nisi* the injunction should not issue at all. (3d Robertson's N. Y. Reports, 523; 26 Maryland, 82; 37th Georgia, 392; 4th New Jersey.) And where collusion and fraud are charged, the answer of one defendant is considered sufficient for all. Now, sir, that being the case here, we have nothing but the bare allegation of William Pitt Kellogg that the Governor and these gentlemen are about to commit these enormous crimes and offenses, in which he charges that a contract was made with every supervisor of registration, before his appointment, to carry out this contemplated scheme by which the voice of the people was to be defeated—an allegation, sir, which the statutes of the State prove to be false, because the registration law was passed in 1870 which required the appointment of registrars throughout the State, and of the chief registrar, whose office should continue for two years; and the chief registrar of this State had been in office two years before this election. This complainant, Kellogg, was nominated for office, as sworn to in the answer, in July, 1872, and the presumption is that the Governor of this State exercised his duty under the registration act in the appointment in 1870 of these officers. There is no allegation in the bill that he removed those who were incumbents and put in new ones for the purpose of carrying out and perfecting this conspiracy. So that the very first allegation in the bill—that the scheme was to control the

votes of this State by these fraudulent appointments—is untrue, on the face of the statute of the State.

There is no allegation in the bill, in regard to the election commissioners, that these frauds were to be committed by the commissioners of election. Their reputation, at least, is unsullied and unstained, so far as this complainant is concerned; and the frauds in regard to suppressing votes could not be committed, except through the instrumentality or the fraudulent conduct of the commissioners of election. Your honor will notice that of the ten thousand voters alleged to have been excluded from the right of voting, not one single solitary voter has had his affidavit filed in this case, to show that he was so excluded on account of race, color, or previous condition of servitude. If we are to take the three or four affidavits which I have read as a sample of the five thousand which they say they will file, there is not one to the effect that any man was excluded from registration or voting on account of race, color, or previous condition, and not one deponent swears that he is a colored man. And yet, sir, this restraining order has been issued upon that foundation. The gentleman says that these are samples; if they are samples, not one of them is admissible in evidence; and I suppose, without examining the whole bundle of merchandise which has been brought in here, that they correspond to the samples. Not one of them, therefore, comes within the act of Congress, entitling such votes to be counted, because the allegation in the bill is that they were excluded from voting because they were excluded from registration. It is not pretended in the bill that anybody was excluded from voting who was registered. The only allegation, so far as votes excluded are concerned, is, that they were excluded from registration. In that event, they must prove that they made affidavits before the registration officers, at the time that they offered to register, that they were refused on account of race, color, or previous condition of servitude; and then with those affidavits they

must make new affidavits, that they were refused the right to vote at the polls upon the affidavit made at the time of registration. Read the act of Congress, and you will find that the second and third sections require that it should appear by affidavit, that the party was refused registration on account of race, color, or previous condition, and then by a second affidavit that he was refused the right to vote on that account, though he produced the first affidavit to the commissioners of election. I say, sir, that there is not a solitary affidavit of any man here who swears that he was rejected for other causes than the want of registration, and not one swears that he was rejected on account of race, color, or previous condition of servitude.

You can estimate from these samples the value of the other allegations contained in the bill. Wherever we have had the slightest opportunity to examine anything outside of the oath of this remarkable man, charging this remarkable fraud upon this number of men throughout the State, we contradict him. If he refers to the law, we contradict him. If he produces affidavits, they themselves contradict him. In the affidavit of Antoine, the candidate for Lieutenant Governor, and also United States officer, as to the rejection of five hundred votes in the parish of Caddo, he does not swear that those votes were registered or were refused registration. He swears, in substance, that he knows of his own knowledge, and from information derived from others, that five hundred men were on election day refused the right to vote, on account of race, color, or previous condition. He does not say that they were registered voters. He does not swear, so far as I know, that any one was refused the right to register. I would like to know whether any of the large number of affidavits filed to-day are from the parish of Caddo. I don't know, as I have not examined them. The complaint also brings the affidavits of the two Lotts and of Kelso, that fifteen hundred legitimate votes were refused registration in the parish of Rapides, and that this was done in the months of September

and October. Why was not your honor appealed to prior to this election? This court had jurisdiction in the matter. The act of 1872 required this court, at the instance of the United States marshal, to go up there in the neighborhood of Rapides, if there had been any such refusal on account of race, color, or previous condition, and to enforce the rights of these men. Was your honor ever called upon to go there and enforce these rights? You might have gone there in September or October, and, by the decrees of this court, have remedied these alleged frauds. These men, after remaining silent until after the election, are now brought up to support this monstrous and untruthful bill, filed against the officers of this State, throughout its entire length, and against gentlemen of as high honor as any in this country.

The very vote published in the papers of these parishes will convince your honor, if you will read it, that these affidavits are false. Take the vote and compare it with the census of the United States as to population; take the vote cast by both parties in those two parishes of Caddo and Rapides, and I say that your honor will come to the conclusion that these affidavits are false. There was a larger vote for both parties in both of those parishes in 1872 than at any other election, and a very large one in proportion to the population of the State, white and colored. Therefore, sir, this bill stands without any support as to fact, except the affidavit of the complainant. Governor Warmoth has denied it throughout in the most formal manner, and all of the defendants to the bill have denied it. Upon the sworn denial of the defendants, then, on the motion to dissolve, the preliminary injunction will be dissolved, and therefore, of course, it will not be granted upon the rule to show cause.

I have done, sir. If I have done nothing more in making this extended argument, I have vindicated a man who, whatever may have been his course in the past, at least cannot now be charged with doing anything detrimental to

the interests of this State. I have shown that this suit is gotten up in consequence of political acrimony, arising out of personal difficulties and disputes in politics between these parties; that there is no foundation in law and no foundation in truth in the allegations contained in this bill; and that the only course which is left to your honor to pursue is to turn this party, so far as this injunction is concerned, out of court, and tell him there is no evidence which he has any interest to preserve, and that all the evidence he wants preserved is preserved for him in the public records of the country.